MOTION FILED
FEB 8 1981

No. 80-978

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980.

WILBUR L. KEPHART,

Petitioner,

vs.

INSTITUTE OF GAS TECHNOLOGY,

Respondent.

MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF AS AMICUS CURIAE

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, and BRIEF AMICUS CURIAE

JONATHAN A. WEISS
LEGAL SERVICES FOR
THE ELDERLY
132 W. 43 St., 3 fl.
New York, NY 10036
(212) 391-0120

January 26, 1981.

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AS AMICUS CURIAE

Petitioner respectfully moves for leave to file the attached brief amicus curiae in this case. No timely brief was filed inasmuch as amicus Legal Services for the Elderly was not aware of the decision in the Court of Appeals in time to file timely.

Although this motion is filed after the expiration of the time prescribed in Rule 36, this Court clearly has power, in its discretion and in the interests of justice, to entertain the motion in these circumstances.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, and BRIEF AMICUS CURIAE

Legal Services for the Elderly hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent has been requested and not yet received by Legal Services for the Elderly.

The interest in this case of Legal Services for the Elderly arises from the fact that it is an organization funded

by Community Action for Legal Services to provide litigation and legal research assistance to attorneys dealing with problems of the elderly. Legal Services for the Elderly is particularly concerned with age discrimination in employment. It is believed that the considerable experience of amicus curiae in dealing with problems of the elderly will permit it to present a more complete argument in this case.

Respectfully submitted,

JONATHAN A. WEISS
LEGAL SERVICES FOR
THE ELDERLY
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STATEMENT OF INTEREST

Legal Services for the Elderly is an organization funded by Community Action for Legal Services to provide litigation and legal research assistance to attorneys dealing with problems of the elderly. Legal Services for the Elderly is particularly concerned with discrimination in employment against older persons, an almost universal problem in the United States, and one which denies approximately 10 per cent of this country's population the opportunity to earn a living and to contribute to society by continuing to work.

Legal Services for the Elderly has participated as co-counsel or amicus curiae in numerous cases before this Court involving the elderly, including Graham v. Richardson, 403 U.S. 365 (1971); Allied Chemical Workers v.

Pittsburgh Plate Glass, 404 U.S. 107 (1971); Ortwein v. Schwab, 410 U.S. 646, reh. den., 411 U.S. 922 (1973); and Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

The consent letter of counsel for petitioner is attached.

REASONS FOR GRANTING THE WRIT

Congress enacted the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., because it found that:

> (1) in the face of arising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a).

The Act was meant to alleviate these problems and

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b). In proving a violation of the act, a plaintiff must only demonstrate that age was <u>one</u> factor in the decision to discharge.

Leugesen v. Anaconda Company, 510 F.2d 307, 310 (9th Cir. 1975) cert. denied 95 S.Ct. 2665 (1975).

Summary judgment is only appropriate where "there is no genuine issue as to any material fact,..." and "the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In determining whether an issue as to a material fact exists, the facts must be viewed in a light most favorable to the party opposing the motion, the petitioner in this case. U.S. v. Diebold, Inc., 369 U.S. 654 (1962). The petitioner must receive the benefit of any doubt, and his allegations must be taken as true. Stevens v. Barnard, 512 F.2d 876 (10th Cir. 1975); Benton-Volvo-Metaire, Inc. v. Volvo Southwest, Inc., 479 F.2d 135 (5th Cir. 1973); Bishop v. Wood, 426 U.S. 341 (1976); Kennedy v. Robb, 547

F.2d 408 (8th Cir. 1976) cert. den. 431 U.S. 959. As the petitioner's petition adequately demonstrates, other Courts of Appeals follow these standards in ruling on motions for summary judgment. See, Mack v. Cape Elizabeth School Board, 553 F.2d 720 (1st Cir. 1977); Hicks v. ABT Associates, Inc., 572 F.2d 960 (3d Cir. 1978); McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980); Hayden v. Rand Corp., 605 F.2d 453 (9th Cir. 1979).

The Court of Appeals for the Seventh Circuit has departed from these well established standards in upholding the granting of summary judgment in this case. For example, in stating that the evaluator who had previously rated Mr. Kephart's work as "good" made it clear in deposition that he meant only satisfactory (p. 3a) the

court not only, on the one hand, identified a genuine issue of material fact, but also, on the other hand, apparently denied petitioner's allegations, and refused to view the facts most favorably to Mr. Kephart. Likewise, the court's statement that other top level employees received better raises than the petitioner directly contradicts the petitioner's assertion that his increases were higher than those given to others holding comparable positions-clearly a matter for trial (p. 5 Petition for Writ of Certiorari).

Summary judgment must be granted especially reluctantly in employment discrimination cases, because such cases necessarily involve questions of interest, motivation, and credibility, that is, questions of fact. See,

Hayden, 595 F.2d at 997; Hicks, 572 F.2d at 968. In affirming the lower court's decision, the Court of Appeals has impermissably evaluated a genuine issue of material fact and thereby departed from the well established standards for summary judgment.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: NEW YORK, NEW YORK
January 26, 1981

Respectfully submitted,

JONATHAN A. WEISS
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New York, NY 10036
(212) 391-0120